

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

TIM MCDONALD, *Petitioner*.

No. 1 CA-CR 22-0047 PRPC
FILED 9-20-2022

Petition for Review from the Superior Court in Mohave County
No. CR2018-00572
The Honorable Billy K. Sipe, Judge *Pro Tempore*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mohave County Attorney's Office, Kingman
By James M. Schoppmann
Counsel for Respondent

Tim McDonald, Douglas
Petitioner

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Maria Elena Cruz and Judge Angela K. Paton joined.

S W A N N, Judge:

¶1 Tim David McDonald petitions this court for review from the dismissal of his petitions for post-conviction relief. We grant review and deny relief.

FACTS AND PROCEDURAL HISTORY

¶2 McDonald was charged with one count of fraudulent schemes and artifices and twenty-two counts of theft. On the state's motion, the superior court dismissed without prejudice six counts of theft on the first day of trial. The jury found McDonald guilty of one count of theft, a class 3 felony, and not guilty of a second count of theft. The jury was unable to reach a verdict on the remaining counts, so the court declared a mistrial as to those counts. The state did not prove any aggravating factors to the jury.

¶3 To avoid a retrial, McDonald pled guilty to attempt to commit fraudulent schemes and artifices, a class 3 felony, and the state agreed to dismiss the remaining charges. The plea agreement stated that though sentencing would be left to the court's discretion, any prison sentence would be concurrent to the sentence imposed for the theft conviction and would not exceed 4.5 years. After reviewing the plea agreement with McDonald, the court found that his plea was knowingly, intelligently, and voluntarily made and that there was a factual basis to support it.

¶4 On July 16, 2020, the court sentenced McDonald to concurrent prison terms of 3.5 years for the theft conviction and 4.5 years for the fraudulent schemes conviction. McDonald's trial attorney filed a motion to withdraw the next day, which the court granted on July 21.

¶5 On July 24, McDonald filed a timely notice of post-conviction relief, alleging that his attorney coerced him into accepting the plea. Then, on March 9, 2021, McDonald filed a second notice, alleging that his failure to file a timely notice of appeal was not his fault.

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¶6 After holding an evidentiary hearing where McDonald and his trial attorney testified, the court denied post-conviction relief and dismissed the proceedings. McDonald then filed this petition for review.

DISCUSSION

¶7 We review a superior court's findings of fact after an evidentiary hearing for clear error. *State v. Berryman*, 178 Ariz. 617, 620 (App. 1994). We defer to the superior court's determination of witness credibility. *State v. Fritz*, 157 Ariz. 139, 141 (App. 1988).

I. THE SUPERIOR COURT PROPERLY DENIED RELIEF WITH RESPECT TO MCDONALD'S COERCION CLAIM.

¶8 McDonald asserts that his trial attorney provided ineffective assistance because he coerced him into signing the plea agreement by telling him that the agreement provided the only possibility to receive probation. *See* Ariz. R. Crim. P. ("Rule") 33.1(a). To show that he received ineffective assistance of counsel during plea negotiations, a petitioner must prove that counsel "either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea." *State v. Donald*, 198 Ariz. 406, 413, ¶ 16 (App. 2000).

¶9 At the evidentiary hearing, McDonald's trial attorney testified that he discussed the pros and cons of accepting the plea agreement with McDonald and advised him that his best chance at probation was to accept responsibility and enter the plea. The superior court found the attorney to be credible. The court further found that based on its own recollection of McDonald's answers and demeanor during the change of plea colloquy, McDonald understood the parameters of the plea, which included a possible prison sentence of up to 4.5 years. The record shows the court questioned the defendant in accordance with *Boykin v. Alabama*, 395 U.S. 238 (1969), and McDonald's responses to those questions indicate that he entered the plea knowingly and voluntarily, *see State v. Hamilton*, 142 Ariz. 91, 93 (1984). The superior court reasonably concluded that McDonald was not coerced into accepting the plea agreement.

II. THE SUPERIOR COURT PROPERLY DENIED RELIEF WITH RESPECT TO MCDONALD'S APPEAL CLAIM.

¶10 Next, McDonald asserts that his failure to file a timely notice of appeal was his trial attorney's fault. *See* Rule 32.1(f).

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¶11 After sentencing, the superior court orally advised McDonald of his appellate rights, including his right to file a notice of appeal within 20 days. McDonald also signed paperwork explaining his appellate and post-conviction rights, and trial counsel testified at the evidentiary hearing that he discussed those rights with McDonald and informed him that counsel would not represent him on appeal. Counsel further testified that he discussed the possibility of an appeal with McDonald's girlfriend after sentencing and sent her a link to a self-help website. The attorney denied that McDonald ever told him that he wished to appeal, and McDonald identifies no evidence conflicting with that assertion.

¶12 The superior court found that though it would have been "better practice" for counsel to file a notice of appeal before withdrawing, McDonald was on notice that counsel would be off the case after sentencing. No evidence showed that McDonald told counsel to initiate an appeal before withdrawing, and McDonald does not allege that he mistakenly believed counsel had filed a notice of appeal. Mere regret that one did not appeal does not establish a cognizable claim under Rule 32.1(f). *See State v. Poblete*, 227 Ariz. 537, 539-40, ¶ 7 (App. 2011). We detect no error in the superior court's denial of relief.

¶13 McDonald finally argues in passing that there was ongoing prosecutorial misconduct, and that the court erred by not appointing new counsel after permitting trial counsel to withdraw. Those arguments are waived because they were not first raised before the superior court, and because McDonald neither cites relevant authority nor develops the arguments in any meaningful way. *See* Rule 33.16(c)(2)(B); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980); *State v. Stefanovich*, 232 Ariz. 154, 158, ¶ 16 (App. 2013).

CONCLUSION

¶14 We grant review and deny relief.



AMY M. WOOD • Clerk of the Court
FILED: JT